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No. 92-1255

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD L. ARKIN,
Petitioner

v.

GAITHERSBURG PUBLISHING COMPANY, INC. and
STEPHEN H. FISHER,
Respondents

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

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REPLY TO BRIEF IN OPPOSITION

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March 5, 1993

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Petitioner finds error or immateriality with designated parts of Respondents' Brief in Opposition for the reasons discussed below.

Petitioner maintains that the Respondents' Question Presented as stated at page (i) of Respondents' Brief is in error. What is at issue is not whether the statement at issue is defamatory or creates an actionable false impression; it is whether each statement at issue is capable of a defamatory construction. If each statement is susceptible of both a defamatory and a nondefamatory determination, it must be permitted to go to a jury to decide whether the statement is defamatory.

Respondents' Question Presented also omits to encompass false light invasion of privacy.

Respondents state at page (ii) that the Washington Post Company has an indirect substantial ownership interest in Respondent, Gaithersburg Publishing Company, Inc. This statement is immaterial. According to a spokesman for the Washington Post Company, the Washington Post Company completed acquisition of The Gaithersburg Gazette, Inc., sometime in 1992. At the time the article-in-suit was published, the Washington Post Company had no ownership interest in Respondent, Gaithersburg Publishing Company, Inc.

Respondents argue in their write-up of Jurisdiction that the principles governing the trial judge's role in determining whether particular statements are capable of bearing the defamatory meaning or false impression alleged are "concededly applicable state law." Respondents refer that statement to their footnote 1 and argue "The First Amendment does not prohibit defamation or invasion of privacy."

Petitioner responds that *Batson v. Shiflett,* 325 Md. 684, 688 (1992), links the First Amendment with the threshold question in a defamation suit as to whether the publication is defamatory in and of itself, or whether in light of extrinsic facts it is reasonably capable of a defamatory interpretation. *Batson, supra,* at 688, also ties the First Amendment to a defamation suit where disputed words are capable of more than one meaning, and states that the meaning to be attributed to those words is a question of fact for the jury. The First Amendment in defamation cases is linked with a showing of clear and convincing evidence of actual malice, i.e., knowledge of falsity or reckless disregard for the truth or falsity of the published matter. These factors have been pled in the Complaint herein.

With regard to false light invasion of privacy, this Court said in *Time Inc. v. Hill,* 385 U.S. 324 (1967), that the First

Amendment prohibited recovery under invasion of privacy in cases where the published matter was in the public interest unless the Plaintiff established that the Defendant acted with malice, i.e., with knowledge of falsity or with reckless disregard of the truth of the published matter. The false light invasion of privacy counts in the Complaint herein alleged those factors.

The prime differences in the two torts are damage to reputation in defamation, and Plaintiff finding the published false statement to be highly unreasonable by putting him/her into a false light without regard to damage to his/her reputation. State law allows satisfaction of a judgment on one of those two torts.

At page 2, Respondents add Maryland Rules 8-114(a) and (b). Those rules are erroneously applied by Respondents as discussed below.

At page 3, Respondents state that the article in suit appeared under a banner titled "OPINION." It should be noted, however, that the article-in-suit was separated from the word "OPINION" by two intervening articles. As can be seen from the copy of the article attached as an appendix to the opinion of the Court of Special Appeals, which did not contain the word "OPINION," it is unclear whether the word "OPINION" that appeared elsewhere on the page was intended to apply to the article-in-suit or was so perceived by readers. The Court of Special Appeals also did not find the word helpful to Respondents (Petitioner's Appendix 1A-29A).

At page 3, footnote 2, Respondents state that they provide a copy of Petitioner's entire Complaint in their appendix. Petitioner views the Counts being appealed as the only material ones and, because the other counts are immaterial, believed there was no necessity to include the other counts in the appendix to his petition for a writ of certiorari.

At page 3, Respondents state that one of their bases for filing a Motion to Dismiss the Complaint was that the Counts as pled did not satisfy the state law torts. Neither the motions judge in the trial court (P.A. 30A-32A) nor the Court of Special Appeals (P.A. 1A-29A) made mention in their opinions of any deficiency in elements of the torts. Because that point had not been at issue, Petitioner saw no reason to discussion it in his petition.

At page 4, Respondents claim that the Court of Special Appeals affirmed the trial court judgment on "both" grounds raised by Respondents in the circuit court and assert that the statements at issue were not reasonably capable of the defamatory meaning alleged. Petitioner does not recognize that either of the opinions indicates that any of the counts in the Complaint was otherwise deficient in any of its elements. Petitioner's view is that the courts' reasoning was confined to only one basis: that the lower courts felt that the statements at issue consisted of rhetorical hyperbole.

At page 4, Respondents claim that statements which constitute rhetorical hyperbole could not serve as the basis for defamation claims under the First Amendment. Petitioner's position is that if the statements at issue consist partly of rhetorical hyperbole and partly of statements purporting to be factual, they are not protected by the First Amendment. Petitioner does not agree with the lower court rulings that the statements at issue consist entirely of rhetorical hyperbole because those statements state or imply facts which are ascertainable for their truth about Petitioner.

At page 4, Respondents state that the Court of Special Appeals opinion disposed of Petitioner's invasion of privacy claims as being "closely related" to the defamation claims. Because the two torts have different elements, the dismissal of one does not automatically provide reason for dismissal of the other. For reasons discussed below, Petitioner disagrees with the lower court

rationale for dismissing the invasion of privacy claims, even though the two torts are "closely related."

At page 5, Respondents claim the Petition does not raise any substantial federal question because Petitioner did not identify any conflict between the decision of the Court of Special Appeals and a decision of another state court of last resort or a decision of this Court. However, a substantial federal question exists.

There are numerous cases in this court which hold that a public figure may be defamed by implication. Petitioner cited as an example *Embrey v. Holley,* 48 Md. App. 571 (1981), *aff'd in part, rev'd in part,* 293 Md. 128 (1982), where a public figure was imputed to be a looter. The holding in *Embrey, supra,* is inconsistent with the decision thus far in this case, where Petitioner, a public figure, was imputed to be dishonest, an arsonist, and an elections law violator. If the state's highest courts are inconsistent with their own decisions relating to federal questions, then this Court is not limited to granting certiorari in examples provided under Rule 10.1 (a), (b), and (c) as Respondents contend. Those examples neither control nor restrict the discretion of the Court. Sup. Ct. Rule 10.1, Fed. Civ. Jud. Proc. (1991).

At page 5, Respondents cited *Davis v. U.S.*, 417 U.S. 333, 340 (1974), for the proposition that intrastate conflicts or questions of state law are not properly reviewable by this Court. Petitioner sees that case not so holding. In that case, at issue were the laws of the U.S., not the laws of a state. The word "intrastate" was not used. "Intracircuit" was probably meant and that point was argued, but was not the final holding in the case as stated by Respondents.

At page 6, Respondents argue that "this Court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied." Petitioner points out the inconsistency between the holdings in

Embrey, supra, and the case herein reflect either a misapprehension or gross misapplication by the courts below.

In footnote 4, Respondents argue that Petitioner's case is neither precedent within the rule of stare decisis nor persuasive authority and may not be cited for any purpose in unrelated cases under Maryland Rules 8-114(a) and (b). Petitioner is not claiming use of his case for any purpose other than to appeal its holding at this time, therefore, is not contravening the two above-cited Maryland rules.

At pages 6 and 7, Respondents argue that *Embrey, supra,* and *Batson, supra,* state "the threshold question of whether a publication is defamatory . . . is for the court upon reviewing the statement as a whole . . ." Yet *Batson, supra,* at p. 688, links that question as one under the First Amendment. Consequently, Respondents' argument that no federal question is raised is opposed by case law.

At page 9, Respondents contend that Counts I, III, and V of Arkin's Complaint were deficient in one or more elements, that the Court of Special Appeals found the dismissal justified on grounds that certain statements were neither libel *per se* nor libel *per quod.* Those conclusions did not arise from deficiency in elements, but in construing the statements at issue in their context to say why the Court of Special Appeals concluded that those statements were not capable of a defamatory determination and consisted only of rhetorical hyperbole.

Petitioner maintains that in Count I, the statement at issue in the article-in-suit constitutes libel *per se* and implies Arkin to be dishonest as a candidate by maintaining a permanent residence outside of Rockville while running for Rockville public office; that in Count III, parts of the article-in-suit constitute libel *per quod,* and imply to people who knew that Arkin's house burned down that he committed arson; and that in Count V, the statement

at issue constitutes libel *per se*, and states or implies that Arkin violated Rockville election laws by running with an improperly constituted election committee. Petitioner concedes that other derogatory statements about Arkin, statements that are not at issue in this case, constitute rhetorical hyperbole, but maintains that they do not render the statements at issue as non-actionable for libel.

At page 9, Respondents argue that the false light invasion of privacy counts II, IV, and VI were properly dismissed because they and defamation are "closely related and the same considerations and legal standards govern both." Petitioner reiterates his earlier argument that even though the two torts contain similar elements, certain elements are dissimilar and a dismissal of the defamation counts does not automatically provide reason to dismiss the false light invasion of privacy claims.

The Court of Special Appeals (P.A. 23A) states that for there to be liability in false light invasion of privacy, the statement publicized must give a false impression, *although the statement does not have to be defamatory in order for liability to attach.* The Court of Special Appeals (P.A. 24A) states that it is a question of law as to whether the statements in context of the publication place the plaintiff in a "false light," i.e., it is "highly offensive" to a reasonable person. The totality of the effect of the nonactionable hyperbolic statements together with the statements at issue for actionability in defamation and in false light invasion of privacy (portrayed as an arsonist, dishonest, and as an election law violator subject to imprisonment) provide considerable weight to a trier of fact to conclude that Petitioner could consider them "highly offensive." Under the First Amendment, false light invasion of privacy is actionable, *Time, supra.*

Most defamation cases involve one defamatory statement in a publication. This case involves several of them in one publication. The Court's deciding this case would be useful to

illustrate that multiple defamations can occur in a single publication, and that when those defamations accompany other derogatory, but not defamatory statements, the multitude of nonactionable statements does not render statements at issue as nonactionable. Petitioner is not aware of any such case being published. Accordingly, review of this case is in the public interest.

At page 10, Respondents state that Petitioner cited certain cases that truthful statements are not shielded from claims of defamation and false light invasion of privacy, and contend that these cases hold that a publication consisting of both true and false statements may be actionable as to the portion found false. Petitioner cited the cases of *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C. Cir. 1966), *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) to illustrate that a material omission combined with true statements is tantamount to an untruth and applied that principle to this case where we have true statements without the whole story creating a false impression of Petitioner in several ways. Accordingly, Petitioner disagrees with any finding that truth is a complete defense to libel, when, as in this case, the truthful statements are mixed with untrue statements and material omissions of fact to impart false and untruthful impressions.

At page 10, Respondents discuss *Embrey, supra,* in footnote 6. Petitioner does not glean from the *Embrey* appellate opinions what Respondents contend in their footnote.

At pages 10 and 11, Respondents state, "In the present case, however, nothing was false or defamatory as alleged" based on the Court of Special Appeals opinion (P.A. 1A-29A). Because the Court of Special Appeals opinion is at issue, Petitioner does not agree with Respondents' conclusory statement.

At page 11, Respondents cite *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 7 (1990), for the proposition that the statements at issue read in context of the article as a whole were marked by the "sort of loose, figurative or hyperbolic language which would negate the impression" that the article stated objective facts about Arkin. Petitioner finds that the hyperbolic statements in the article-in-suit amplify the tendency of the statements at issue to be defamatory because the hyperbolic statements read together with false statements appearing to be factual make the false statements more believable to the reader and impart false and untruthful impressions. They do not make the statements at issue nonactionable hyperbolic statements.

At page 11, Respondents cite *Blouin v. Anton,* 431 A.2d 489, 490-91 (Vt. 1981) that statements used in the context of a political skirmish could not have been believed to convey objective fact, and apply that holding to this case. Petitioner points out that in *Blouin,* the statement at issue was made while a political campaign was under way, while in this case, the statements at issue were made some 50 days after election day. In *A. S. Abell v. Barnes,* 258 Md. 56 (1970), *cert. denied,* 403 U.S. 921 (1971), Barnes had been a candidate for public office. Two days after the election, Defendant A.S. Abell published an article claiming Barnes failed to make a required filing with the Board of Election Supervisors, a violation of the election law. The Court of Appeals held that the statement was libel *per se* because it suggested violation of law. Because testimony showed the reporter published his story as part of an honest mistake, malice was not shown, however. Accordingly, this case is inapposite with *Blouin.*

CONCLUSION

For reasons set forth in the Petition for a Writ of Certiorari, and in the Reply to Respondents' Brief in Opposition to the

Petition, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted

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